MAY 28 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 983 120

DEAN DEFORT LIAKAS, Petitioner,

vs.

THE STATE OF TENNESSEE,
Respondent.

(Tenn. No. 36,595; 6.)
(Supreme Court #6.)

DEAN DEFORT LIAKAS, Petitioner,

vs.

THE STATE OF TENNESSEE,
Respondent.

(Tenn. No. 68,967.)
(Supreme Court #9.)

PETITION FOR WRIT OF CERTIORARI

Directed to the Supreme Court of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

Directed to the Supreme Court of Tennessee.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner, Dean Defort Liakas, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Tennessee.

1. The Opinions of the Supreme Court of the State of Tennessee in these cases are styled respectively (1) "Dean Defort Liakas and Frank James Ellsworth v. State of

Tennessee, No. 36595;6" in the records of said court and reported in 286 S. W. 2nd 856, and, (2) "Dean Defort Liakas and Frank James Ellsworth v. State of Tennessee, No. 68969, Supreme Court #9," and reported in 288 S. W. 2nd 430. They have not yet been officially reported by the State of Tennessee. Copies of the Opinions are appended to this Petition.

The Opinion in the first case, No. 36595;6, which is hereinafter referred to as Record No. 6, appears in the transcript of said cause on pages 185 to 196, and the Opinion in the second case, No. 68969, hereinafter referred to as No. 9, appears on pages 226 to 232 of the transcript thereof, both transcripts being filed with this petition.

The two cases sought to be reviewed on certiorari to the Supreme Court of the State of Tennessee involve identical and closely related questions, and the same petitioner; each is based almost entirely on the same facts and circumstances, and both had their origin in the seizure of a quantity of allegedly stolen suits of clothing in an automobile in Nashville, Davidson County, Tennessee, by a city police officer shortly after he had arrested the Petitioner in that city on September 2, 1954.

2. The jurisdiction of this Court is invoked because in each case in which review is sought the Supreme Court of Tennessee has decided a Federal question of substance not theretofore determined by this Court and has decided it in a way not in accord with applicable decisions of this Court, and important questions in the general administration of criminal justice under the "law of the land" are raised in these proceedings.

The question involves the application of Section 1 of Amendment 14 to the Constitution of the United States, which, insofar as it is applicable, provides, "* * * nor shall any State deprive any person of * * * liberty * * * without due process of law."

3. The two judgments sought to be reviewed were ren-ered by the Tennessee Supreme Court on February 3, and arch 9, 1956, respectively, and entered of record on said spective dates.

4. The time in which to file for a Writ of Certiorari in e first case (No. 6) was extended to and including June 1956, by Mr. Justice Stanley Reed by an Order issued the 2nd day of May, 1956.

5. The statutory provision believed to confer on this urt jurisdiction to review the judgments in question by rit of Certiorari is Section 1257 (3), Title 28, United ates Code Annotated.

PRINCIPAL QUESTION INVOLVED.

The principal question presented for review is whether was violative of the due process of law clause of the th Amendment, Section 1, of the Constitution of the ited States to try and convict the Petitioner in the iminal Court of Shelby County, Tennessee, at Memphis, indictments charging that at certain times he did **in elby County** "unlawfully, feloniously and fraudulently ceive, buy and conceal" a suit of clothes knowing the me to have been previously stolen, when the undisputed cts in each case showed that if there was any receiving, ying or concealing of said property the same occurred Davidson County, Tennessee.*

Petitioner sincerely insists that he was tried for one of-nse and convicted for another, which procedure was not e process of law, and that it was further violative of the e process of law clause to put a person on trial without s consent in a district or county other than the one in hich the alleged offense was committed.

---

* Each of the two indictments in the First Count charges the Petitioner h larceny of the respective suits committed in Shelby County, Tennessee, and since he was convicted on only the receiving and concealing nt he was, under the Tennessee law, acquitted on the theft charges.

THE TENNESSEE STATUTES.

The statutes of Tennessee applicable at the time are, Tennessee Code of 1932, as follows:

> "Sec. 10928. Every person who shall fraudulently receive or buy, conceal, or aid in concealing, any goods over the value of sixty dollars, feloniously taken or stolen from another, or goods obtained by robbery or burglary, knowing the same to have been so obtained, with intent to deprive the true owner thereof, shall be imprisoned in the penitentiary not less than three nor more than ten years."
>
> "Sec. 11472. The local jurisdiction of all offenses unless it is otherwise provided by law, is in the county in which the offense was committed."

The latter statute is declaratory of the provision of Article 1, Section 9, of the Tennessee Constitution providing for a trial in "the County in which the crime shall have been committed."

SUMMARY STATEMENT OF MATTERS INVOLVED.

In the first case (No. 6) the Petitioner and co-defendant, Frank James Ellsworth, were tried in Shelby County Criminal Court on an indictment charging in the First Count that they on the ..... day of ....., 1954, **in Shelby County**, stole, took and carried away a suit of clothes belonging to Levy's Store for Men of the value of $145.00, and in the Second Count alleging that on the same ..... day of ....., 1954, the defendants feloniously and fraudulently did "receive, buy, conceal and aid in concealing" the same suit **in Shelby County**, Tennessee, which suit they knew to have been stolen (R. 6, p. 6).

On November 24, 1954, the jury found both defendants guilty under the Second Count of receiving stolen property

l fixed their punishment at not more than seven years the state penitentiary (R. 6, p. 165). Petitioner l co-defendant both seasonably appealed to the Supreme art of Tennessee.

Thereafter, in May, 1955, both defendants were again d on the same type of an indictment, charging in the st Count the larceny in **Shelby County, Tennessee**, of a of clothes worth $125.00 belonging to Hal J. Daniel, l in the Second Count the receiving, buying and con- ling said suit **in Shelby County, Tennessee**, which they w had been theretofore stolen. On May 17, 1955, the r found them guilty "of receiving stolen property over value of sixty dollars" and fixed their punishment at years in the penitentiary (R. 9, pp. 6, 173).

gain Petitioner and co-defendant seasonably appealed he Supreme Court of Tennessee.

n stating the facts we will, in the main, use those in script No. 6 since they have slight difference, if any, n those in case No. 9.

t noon on September 2, 1954, Traffic Policeman Hobbs erved one Mallernee, a Nashville merchant, pursuing Petitioner and Ellsworth on Church Street, in the center he Nashville, Tennessee, shopping district, at the same shouting to passersby, "Stop that thief!" Hobbs ered the chase and overtook Ellsworth several blocks y (R. 6, pp. 130-133). Mallernee followed Peti- er into the Castner-Knott Department Store on Church et and he and Detective Elliott of the Nashville Police artment Shoplifting Squad, who happened to be in the e, both seized Petitioner, who at the time was carrying g in which, it was testified, were two suits Mr. Maller- claimed had been stolen from his store (R. 6, p. 19). Detective at that point took from Petitioner's hand a n check for a car parked in the Cain-Sloan Department

Store Garage, which check, the Detective said, the Petitioner was endeavoring to swallow (R. 6, pp. 21-23). Thereupon, Ellsworth and Mallernee escorted the Petitioner to the Mallernee Store, where they met Officer Hobbs, who had Ellsworth in custody (R. 6, p. 26). Both arrested parties told the officers they were from Omaha, Nebraska. Thereupon, without asking for or obtaining consent of Liakas or Ellsworth, Detective Elliott, leaving the prisoners in the store, carried the claim check to the Cain-Sloan parking lot and proceeded to search the automobile referred to in the claim check. This claim check (Exhibit 2), duly certified as an exhibit, has been filed with the records in this cause. The manager of the parking lot had written thereon the registration number of the Nebraska license plates for this car, to-wit, "1-14791 Nebraska" (R. 6, pp. 77-78).

The Cain-Sloan parking lot is not connected with and is removed some distance from the Mallernee store and the Castner-Knott store.

When the Detective came upon the automobile, he stated, he observed a number of new suits the trousers of which had not been cuffed lying on the back seat. He then took the automobile and its contents to the Mallernee store (R. 6, pp. 64-67).

All the foregoing matters occurred in Nashville, Davidson County, Tennessee, some 200 miles from Shelby County, Tennessee. Traveling on a direct line between the two cities of Nashville and Memphis it is necessary to cross nine other counties.

One of the suits found in the automobile was claimed as property of Levy's store in Memphis by its manager, James M. Davis. As to when or how it was removed from the store he did not know. The trousers had not been cuffed. Davis further testified that on September 1, 1954,

Petitioner and Ellsworth entered the Levy's store and ile Liakas shopped for some socks he later bought. sworth examined a rack on which a number of suits re hung. Liakas changed his socks in the men's dress- room (R. 6, p. 96).

On cross-examination Davis stated that so far as he ew from the time the Petitioner and Ellsworth entered store and until their departure nothing was removed, ncealed or carried from his place of business (R. 6, p. 3). Some ten days after the visit he identified the suit the Memphis police station (R. 6, p. 124).

Davis did not know the suit was missing until the ephoned call from the police about September 10, 1954 6, pp. 100, 113).

At the second trial Hal J. Daniel, Jr., an employee of the ius Lewis store in Memphis, stated that on September 1954, he traveled to Nashville, and among the clothing t had been seized by the officers in the automobile nd his own personal suit, which he had owned for some e and which he had last seen in the preceding month of gust in Memphis, Shelby County, Tennessee. The wit- s' suit was in the Julius Lewis store the last time he it (R. 9, pp. 17, 18).

There was no evidence that either the Petitioner or sworth had ever been in the Julius Lewis store in mphis.

The evidence was the same in the second case except t therein Millard Hill, a room clerk at the Hotel ridge, Memphis, produced a registration card dated gust 31, 1954, at 8:11 P. M. (R. 9, p. 155), for a single m with two names thereon, purported to be guests, wit, "Ellsworth and Liakas" (R. 9, p. 143).

There was no evidence as to whether the party or parties ned on the card were of the male or female sex (R. 9,

p. 159) or whether one or two persons signed the card (R. 9, p. 157).

The questions presented for decision were raised in the first case by Petitioner in his Motion for a New Trial in specifications thereof numbered IV, V, VI (R. 6, p. 171), presented in the Criminal Court, Shelby County. The Motion for a New Trial was by the Court overruled (R. 6, p. 184). They were presented to the Supreme Court of the State of Tennessee by Petitioner's Assignments of Error to his Brief, which assignments were numbered I, II and III (R. 6, p. 223). These assignments attacked the sufficiency of the evidence.

In the second case, No. 9, the questions were raised on the Petitioner's Motion for a New Trial in the Criminal Court, Shelby County, Tennessee, in specifications Nos. IV, V, VI and VII (R. 9, p. 176). The Motion for a New Trial was overruled. The same questions were presented to the Supreme Court of the State of Tennessee in Assignments of Error I, II and III in the plaintiff's brief (R. 9, p. 208). The specifications and assignments were based on the evidence showing the alleged crime, if committed, was committed in Davidson County and not in Shelby County, Tennessee.

ARGUMENT.

The Petitioner and his codefendant have been by the ury verdicts conclusively adjudged not guilty of the lar-eny of the suits in question as charged in the First Count f the two indictments, since the conviction on one count f an indictment operates as an acquittal of all other ounts.

State v. Abernathy, 153 Tenn. 441, 284 S. W. 361;
Asbury v. State, 178 Tenn. 43, 154 S. W. 2d 794;
Baty v. State, 191 Tenn. 592, 235 S. W. 2d 591.

In the instant case, both defendants were notified when ne trials began that they would have to defend a charge f receiving, possessing and buying stolen property in helby County, Tennessee, and this particular offense was ne only one they were called upon to defend under the econd count of each indictment. There is no evidence, irect or circumstantial, that any part of, or any act re-ulting in, the receiving or buying of stolen property ccurred in Shelby County. It follows that the convictions st on evidence whose only tendency, at the most, is to rove a crime, if any, committed in another division and istrict than those named.

To put one on trial for one offense and to convict him of nother is a denial of that due process of law safeguarded y the Constitution of the United States. **Cole v. Arkan-as**, 333 U. S. 196; **Stewart v. Michigan**, 232 U. S. 665; **Vann U. S.** (5th Cir.), 76 Fed. 2d 608.

As stated by Chief Justice Neil, in affirming the second onviction of the Petitioner (288 S. W. 2d 430, 431):

> "Larceny is a separate and distinct crime from that of receiving stolen property and jurisdiction is in the county where it was feloniously received."

In the foregoing the Chief Justice was merely restating the law of Tennessee. **Swaggerty v. State**, 73 Tenn. 338; **Harris v. State**, 75 Tenn. 124; **Roach & Emanuel v. State**, 43 Tenn. 39.

In the **Swaggerty** and **Roach** cases, supra, it is declared that the receiver is not an accessory after the fact to the larceny. Furthermore, in the **Roach** case, it is stated that the offense of receiving stolen property is complete in the county where the goods are received and concealed.

We are aware that actual possession of stolen goods has been held to warrant an inference that the possessor stole the same, but any inference following from that circumstance must vanish when the jury finds the accused not guilty of the theft. The possession, however, must be actual and not constructive, and if there was any possession of the goods attributable to the Petitioner in this case the same was constructive, and from that character of possession no inference is drawn. See **Pearson v. U. S.** (6th Cir.), 12 Fed. 2d 681.

Your predecessors have declared that receiving stolen property is a separate offense from larceny. **Kirby v. U. S.**, 174 U. S. 47, 43 L. Ed. 890, 19 Sup. Ct. 574.

Under the second count of the Dyer Act, Sec. 2313, Title 18, one charged with selling a stolen automobile after its interstate transportation may be lawfully tried only in the state and district where the sale occurred. **Ventmiglia v. Aderhold** (D. C. Ga.), 51 Fed. 2d 308.

With all deference to the members of the Supreme Court of Tennessee, whom the authors of this Petition respect officially and personally, we say they have upheld convictions in these two cases contrary not only to the 14th Amendment of the United States Constitution, but also in the face of Article 1, Sec. 8, of Tennessee's Constitution, providing, among other things, "that no man shall be

* * * deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

Section 9 of the same Article of the Tennessee Constitution also provides that the defendant shall have "a speedy public trial by an impartial jury of the County in which the crime shall have been committed * * *." This latter provision guarantees trial in the County in which the alleged crime was committed. **State v. Tollett**, 173 Tenn. 47, 121 S. W. 2d 525, 526. Trial elsewhere than in the County or district where the alleged offense was committed always has been deemed contrary to the concepts of fundamental American justice, and against "the law of the land." It is not amiss to say that the same was denounced in the Declaration of Independence.

Two hundred miles separating the County wherein the alleged offense is committed and that in which the trial is held could, in some instances, be as embarrassing and burdensome to a defendant as if he were transported beyond the seas for prosecution.

The Sixth Amendment to the United States Constitution, among other things, provides "* * * In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

Many of the safeguards stated in the 5th and 6th Amendments of the United States Constitution, have been held indispensable to due process of law, and their enforcement held required by the fundamental principles of liberty and justice.

In **Hebert v. Louisiana**, 272 U. S. 312, 17 Sup. Ct. 103, Justice Van Devanter declared, concerning the due process clause:

> "What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions, and not infrequently are designated as the 'law of the land.' "

Your Petitioner insists that the requirement in the 6th Amendment that the trial be in the district wherein the offense was committed, was made operative upon the States by Section 1 of the 14th Amendment of the United States Constitution. See, **Grosjean v. American Press Co.**, 297 U. S. 233, as follows:

> "But in **Powell v. Alabama**, 287 U. S. 47, we concluded that certain fundamental rights safeguarded by the first Eight Amendments against Federal action, are also safeguarded against State action by the due process clause of the 14th Amendment, and among them, the fundamental right of the accused to aid of counsel in a criminal proceeding."

In **Powell v. Alabama**, 287 U. S. 45, this Court declared that the 14th Amendment made certain of the provisions of the so-called Bill of Rights in the first Eight Amendments effective as to, and controlling, the action of state courts and other state agencies. Therein, the Supreme Court declared the effective assistance of counsel essential to due process under the 14th Amendment, despite a belief of some theretofore entertained that the enumeration of the rights in Federal prosecutions under the first Eight Amendments removed all of them from the due process clause. Therein appears the following:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316), is

obviously one of those controlling considerations which must prevail in determining whether it is embraced within the due process clause of the 14th Amendment, although it be separately dealt with in another part of the Federal Constitution."

We respectfully submit that, subjected to the tests defined in the prior decisions of this Court, the conviction of this Petitioner for an offense radically different from that charged in the indictment and, if committed, taking place in another jurisdiction, is inconsistent with due process of law.

In the Opinion in the second case herein, 288 S. W. 2d 430, 432, appears a seriously factual error on the part of the Honorable Chief Justice, responsible for his conclusion that the offense was committed in Shelby County, Tennessee. We quote from his Opinion:

> "One of the strongest circumstances pointing to receiving in Shelby County is that the suit in question (and seventeen other suits) were found in an Oldsmobile that was registered in the name of Mrs. Liakas, wife of one of the defendants. These garments must have been placed in this car before it left Shelby County. The officer testifying as to the registration of the car must have obtained this information from the records in Shelby County, or State records, showing it was a Shelby County car."

The original parking lot ticket, exhibited in both cases, reveals that the car, contrary to the statements of the Chief Justice, was not registered in Shelby County or anywhere else in the State of Tennessee, but that it had on it Nebraska license plates. The manager of the Cain-Sloan parking lot having written the car's registration (Nebraska) on the claim check for identification purposes. In the first case (R. 6, p. 78) Officer Elliott stated the car had

a Nebraska license (Exhibit No. 2, at end of Record No. 9).

We anticipate it might be suggested that if the convictions are set aside the Petitioner might, without too great difficulty, meet the same fate in the criminal courts of Davidson County, Tennessee. We unnecessarily refer your Honors to the following from **Bollenbach v. U. S.**, 326 U. S. 607:

> "* * * It may not be amiss to remind that the question is not whether guilt may be spelled out of the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in Federal courts."

We submit this situation is the same where the action of a State court is being reviewed by the United States Supreme Court.

Your Petitioner, therefore, respectfully submits to this Court that a Writ of Certiorari should issue out of the Supreme Court of the United States to the Supreme Court of the State of Tennessee taking jurisdiction of these cases.

Respectfully submitted,

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APPENDIX.

(Copy)

SENTENCE IMPOSED MAY 16, 1955, IN CRIMINAL COURT.

Criminal Court of Shelby County, Tennessee.

No. 6.

Monday, May 16, 1955.

State of Tennessee		
v.	No. 68,968	Larceny and Receiving Stolen Property.
Dean Defort Liakas, alias "Dean Defore Liakas," and Frank James Ellsworth.		

Comes the Attorney General on the part of the State and the defendants in proper person and by counsel of record, whereupon there comes on to be heard defendants' motion for a new trial herein, which motion having been heard and fully understood by the Court is overruled and the Court proceeds to pass sentence, which is that they be taken by the Sheriff and remanded to jail and at his earliest convenience delivered to the Warden of the State Penitentiary, therein to be confined at hard labor for a period of Not More Than Seven Years, that they be rendered infamous and incapable of exercising the elective franchise and that they pay the cost of this prosecution for which let mittimus and execution issue. Thereupon the defendants prayed an appeal to the next term of the Supreme Court sitting at Nashville, Tennessee, for the Western Division of the State, which appeal is granted and the defendants are allowed thirty days in which to file their bill of exceptions and perfect said appeal. It is further ordered by the Court that

appeal bond in above cause be fixed at $5,000.00, each defendant.

Whereupon court adjourned until tomorrow morning at 9:30 o'clock.

Signed: Sam D. Campbell,
Judge.

SENTENCE IMPOSED JULY 14, 1955, IN CRIMINAL COURT.

Criminal Court of Shelby County, Tennessee.

No. 9.

State of Tennessee

vs. 68,969

Dean Defort Liakas and Frank James Ellsworth.

Whereupon, on July 14, 1955, defendants' motion for new trial was argued by counsel for the defendants and after full argument the Court denied defendants' motion for a new trial.

Thereupon defendants, through their counsel of record, excepted to the action of the Court in overruling defendants' motion for a new trial and prayed an appeal to the next term of the Supreme Court, sitting at Nashville, Tennessee, for the Western Division of the State, which was granted by said Court, and defendants allowed thirty (30) days within which to file and tender their Bill of Exceptions and perfect said appeal. The defendants' bail was fixed in the penalty of $10,000.00 each.

Thereupon the Court proceeded to impose sentence upon defendants, Dean Defort Liakas and Frank James Ellsworth, and the following sentence was imposed:

"That they be taken by the Sheriff and remanded to jail and at his earliest convenience delivered to the Warden of the State Penitentiary, therein to be confined at hard labor for a period of not more than (10) years; that they be rendered infamous and incapable of exercising the elective franchise, and that they pay the costs of this prosecution, for which let mittimus and execution issue."

PRINTED SUPREME COURT OPINION.

(Filed February 3, 1956.)

Supreme Court No. 6.

Dean Defort Liakas and Frank James Ellsworth

v.

State of Tennessee.

Supreme Court of Tennessee.

Feb. 3, 1956.

Defendants were convicted in the Criminal Court, Shelby County, Sam D. Campbell, J., of receiving stolen property, and they brought error. The Supreme Court, Burnett, J., held that there had been adequate identification of stolen property in question.

Affirmed.

1. **Criminal Law Key 563**

Corpus delicti in criminal cases may be proven by circumstantial evidence.

2. **Criminal Law Key 741 (1)**

Tennessee courts do not recognize the scintilla rule, and there must be some material evidence to take case to jury.

3. **Receiving Stolen Goods Key 8 (3)**

In prosecution for receiving stolen property there was adequate identification of stolen suit to sustain conviction.

4. **Criminal Law Key 1159 (6)**

Inferences to be drawn from circumstantial evidence are for jury, and it is not province of reviewing court to substitute its own inferences for those drawn by jury.

5. **Searches and Seizures Key 7 (1)**

It is only when search is unreasonable that it becomes unlawful.

6. **Arrest Key 71**

A search may be made without a warrant when there is a lawful arrest, and any incriminating articles may be seized.

7. **Arrest Key 71**

Where officers had arrested defendants in flight for committing a felony, and found one defendant attempting to dispose of parking lot ticket, subsequent search of vehicle for which ticket was claim check was not unreasonable. Code, §§ 11536, 11541.

8. **Criminal Law Key 369 (2)**

In prosecution for receiving stolen property it was not error to admit testimony that there had been found in defendant's automobile, in addition to property involved in prosecution, a suit stolen from another individual.

Thomas L. Robinson, Memphis, for plaintiffs in error.

Nat Tipton, Advocate Gen., Nashville, for the State.

Burnett, Justice.

The plaintiffs in error were indicted, tried and convicted for receiving stolen property of the value of more than $60. For this offense the jury fixed their punishment at not more than seven years confinement in the State Prison. It is from this judgment that the plaintiffs in error have seasonably perfected their appeals. Excellent briefs have been filed on both sides and a very able argument heard on behalf of the plaintiffs in error. We have studied this record, the briefs and read all authorities cited and made quite an independent investigation, because of the particular interest related to some of the questions involved. Having done this we now have the matter for determination.

On September 2, 1954, at noon, a traffic policeman on duty at Capitol Boulevard and Church Street in Nashville noticed two men running down, in a westwardly direction, Church Street. It was a rather hot day and he made some jocular remark about their speed. Immediately after he had seen these men he saw Mr. Mallernee, a merchant of Nashville, running after them and calling to passersby, "Stop that thief." The police officer immediately gave chase to one of these two men who turned out to be Ellsworth, the only person that he saw at the time and after capturing Ellsworth back of the Savoy Hotel on Seventh Avenue he took him back to Mr. Mallernee's store.

In the meantime the other man ran into Castner-Knott's store and an officer who was in this store on a shoplifting detail saw a commotion near the store and ran up and he and Mr. Mallernee caught Liakas. At the time they caught Liakas he was carrying a valise or bag. This bag that Liakas had in his possession contained two suits of clothes which Mr. Mallernee claimed to have been stolen from his store. The officer, in company with Mr. Mallernee, took Liakas to an anteroom at Castner-Knott's to search him for weapons. In the process of this search he saw Liakas take a parking ticket out of his shirt pocket and undertake to

swallow this claim check. This officer then grabbed Liakas by the hand and prevented him from swallowing the check which proved to be a claim check for a car parked in the Cain-Sloan Parking Garage. The officer and Mr. Mallernee then took Liakas back to Mr. Mallernee's store where they found the police officer had already arrived with Ellsworth. Both the officer Elliott, who was in Castner-Knott's, and the traffic policeman testify that when they reached this point, or that is, as they came in the store Mallernee and Elliott with Liakas, that Ellsworth offered Mr. Mallernee $1,000 to drop the prosecution, but Mr. Mallernee very indignantly said he would not do it for $10,000.

After this was done Elliott, the officer who was at Castner-Knott's store, took the claim tag to the car which was parked in the parking lot and without a search warrant went to this parking lot and after a conference with the manager of the parking lot he was taken to where the car was stored there. The officer's testimony is that when he approached the car he could see through the windows a great number of men's suits, some in zipper bags and others lying loose on the seat. He also noticed that some of the clothes had no cuffs on the trousers. After examining this for some length this officer took the car and drove it back up to Mr. Mallernee's store where he, in company with others, investigated the contents of the car. Among the men's clothing found in this car was a suit which the authorities of Levy Brothers store in Memphis undertook, in the instant lawsuit, to identify as one that had come from their store.

The instant suit grew out of a double-barrel indictment for stealing and for receiving stolen goods, that is, the suit which Levy Brothers claimed came from their store. A Mr. Davis, one of the partners in Levy Brothers, testifies that on or about September 1, 1954, or the day before these plaintiffs in error were caught in Nashville, that the plain-

's in error came into Levy Brothers store in Memphis
l Liakas purchased a pair of socks. He also testifies that
ile Liakas was looking at these socks that Ellsworth was
another part of the store where men's suits were hung
racks and that he took several of these suits off of the
k and examined them and looked at them. After Liakas
l purchased his socks he asked where the dressing room
s and went into the dressing room to put these socks on.
eems that when he went into the dressing room to do so
t he had a suitcase with him and he stayed in that dress-
room for some 20 or 25 minutes. At this time, though,
t is, September 1, 1954, the day before these two men
e caught here in Nashville, there was apparently no sus-
on attached to these plaintiffs in error, that is, when
r were in Levy Brothers store in Memphis.

he suit in question in this lawsuit was of a make and
tern carried by Levy Brothers store. The testimony is to
effect that the manufacturers of this suit make up an
r of clothes for various retailers and put in it a label
gnating the store from which it was bought. This label
been cut out of the suit in question. In addition thereto,
n a tag on this suit there was undecipherable writing.
Davis testified that a notation had been made on a suit
ne of the clerks of the name of a prospective customer
whom it was being held. After the discovery of this
in the possession of the plaintiffs in error, Levy
hers records were checked by Mr. Davis and it was
d that a suit of this precise description was missing
their stock and that the record contained no notation
this suit had ever been sold in the usual course of busi-
. There was also testimony introduced, strenuously and
usly objected to, to the effect that in this car there was
d a suit stolen from a Mr. Daniels in Memphis.

is rather long recitation of the fact of this case are
ssary to arrive at the questions here presented. The

very obvious assignment is that there was not adequate identification of the suit in question to have been taken from Levy Brothers; and that it was error for the trial court to permit testimony as to the search of the automobile in Nashville, and that the admission of the testimony of Daniels about his suits being in this pile having been stolen from his store are all such harmful errors as to require this Court to reverse the case. There are other incidental things or questions presented herein, but these all, more or less, revolve around the three questions last above mentioned and will all be discussed in the course of this opinion without taking up the assignments seriatim.

[1, 2] The question presented by the brief, so ably argued in oral argument, is that the evidence was not adequate for the jury to conclude beyond a reasonable doubt that this suit was the one missing from Levy Brothers store in Memphis. The evidence, it is true, is circumstantial, but it is well settled in this State that the corpus delicti in criminal cases as well as in others may be proven by circumstantial evidence. Ford v. State, 184 Tenn. 443, 201 S. W. 2d 539. In the course of the trial counsel in objecting to certain things that were attempted to be introduced, the court made the statement in reference to this circumstantial evidence that if there was a scintilla of evidence it would be necessary to let the matter go to the jury. This is an unfortunate statement and is not what the court meant. Of course, there must be some material evidence of a fact to go to a jury even though this might be circumstantial. We in this State do not recognize what is known as a scintilla of evidence because if there was nothing more under our rules there would be no evidence.

The trial jury had before it the fact that a suit of clothes of the character and make here shown to the jury was missing from Levy Brothers store and that the inventory showed that such a suit had been purchased by them, and

that their sales record failed to disclose that it had ever been sold in the normal course of events. The jury also had before it the testimony that the two plaintiffs in error were in this store not too long before the loss of this suit was discovered and that one of them was seen to take a number of suits off of one of the racks in the store. The jury likewise had evidence to the effect that the missing suit was manufactured by the same manufacturer and of the same pattern as the one found in the possession of the plaintiffs in error. Of course, the finding of this suit in the possession of the plaintiffs in error, and whether or not it could be offered in evidence, will be dealt with very soon in our treatment of whether or not this could have been offered in evidence.

The plaintiffs in error both claimed that the car in which the suits were found was not theirs, but they had in their possession the parking ticket for this car, and it is shown that the car was registered in Liakas' wife's name.

[3] The jury had evidence that the retailer's label had been cut out of this suit, and it was likewise evident that these suits still had the trouser legs unfinished and there were no cuffs on them; in other words, that they were not finished up ready for wear for a man to be hauling them around in a car for his own use. The jury, of course, could draw from their knowledge of these things that whenever a suit was sold through legitimate channels in a store that the trousers are cut and made to fit the purchaser and that the cuff is put on. On this suit there was some kind of a tag which Davis claimed had some significance as showing that the suit belonged to Levy Brothers. Davis produced one of his regular stock tags and testified that it is identical with the tag found upon this suit, and he showed it, as far as the court could find out, with some undecipherable notation upon the tag that was in the suit. It seems to us that clearly in the absence of testimony to the contrary that under these circumstances that they were sufficient to war-

rant the trial jury in concluding that this suit which was found in this car was one that had been stolen from Levy Brothers' store.

This evidence, of course, that we have reviewed above is that that is most favorable to the State in proving that the suit came from Levy Brothers. On a question of the kind here that is the evidence that we look to. We are not weighing the evidence and comparing it with the evidence otherwise since the jury has determined in favor of the State on this evidence.

[4] When there is material evidence offered in a case it is not our province to substitute our inferences for those drawn by the jury in cases of circumstantial evidence. These inferences are for the jury to draw. Stanley v. State, 189 Tenn. 110, 222 S. W. 2d 384. The circumstances proven definitely warrant this jury, or a reasonable juror, in their conclusions as to the identity of the two suits or this suit. The question clearly was primarily for the jury and we should not overturn such a finding when there is ample evidence to support the finding of the jury.

[5] The very able argument is made that the search of the car wherein the suit here in question was found was unlawful, that it was a general exploratory search, made solely in the hope of finding evidence—any evidence—which might connect these defendants with any crime. It is said and very reasonably and well said that the officers here had a reasonable and ample opportunity to obtain a search warrant for this car. It is said that no reason is apparent for the officers' failure to do so, except the wholly inadequate one that it was less troublesome and more expedient to proceed to search the car without a warrant. Thus it is forcefully argued that the search was an unreasonable one within the constitutional prohibition against unreasonable searches. And it is only when the search is unreasonable

that it becomes unlawful. Templeton v. State, 196 Tenn. 90, 264 S. W. 2d 565.

[6] In most States, as in Tennessee, a search may be made without a warrant when there is a lawful arrest. Elliott v. State, 173 Tenn. 203, 116 S. W. 2d 1009. When thus making a lawful arrest incriminating articles which are connected with the crime for which the arrest was made or are the means in the possession of one with which the crime was committed as well as any weapons or other things that might effect the criminal to escape which are found in his possession may be seized. Probably the most far-reaching case of the kind is that of Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. In this case the Supreme Court of the United States held that a search without a warrant which was made incident to a lawful arrest might be extended beyond the person to include the premises under his immediate control. There are all kinds of cases in the books in which in some instances it is held that a search may be made and others that it may not, depending on the facts presented in each individual case. Probably a case going to the other extreme and distinguishing the Harris case, and in effect saying that it is going as far as could be gone, was the case from the Fifth Circuit of the United States Court of Appeals of Drayton v. United States, 205 F. 2d 35. This case takes up many, many Federal cases on the question and holds that where a lawful arrest was made that the officers had no right to go up a third floor of the house after taking the keys away from the one that had been arrested and getting some contraband there.

We said before that the kind of a search that was obnoxious was an unreasonable search. The authors of American Jurisprudence in Volume 47 thereof at page 532 under Searches and Seizures say this:

"An unreasonable search has therefore been defined as an examination or inspection without authority of law of one's premises or person, with a view to the discovery of stolen, contraband or illicit property, or for some evidence of guilt, to be used in the prosecution of a criminal action."

[7] This brings us to the facts of the instant case. Here the officers had arrested the plaintiffs in error for committing a felony. It is apparent that while thus under arrest one of the plaintiffs in error attempted to dispose of this parking lot ticket. Their flight before they were caught was a part of the commission of this felony of grand larceny. When the plaintiffs in error had been arrested for the commission of this felony and this incriminating document which he sought to destroy having been found on him, clearly the officer should make a further investigation as to what he would find as a result of this information which was attempted to be destroyed. It seems to us that this clearly was information or an indication to the officer that these parties were trying to dispose of this in an act to cover up other felonies that they were in the process of committing. Thus with this in view this officer went to this car and obtained the information above detailed. Naturally it was probable, and was right, for the officer to conclude, and the officer might have concluded, that this ticket was to a stolen automobile, another felony. When the officer got there though he found these clothes which had been stolen. In other words, the ticket was the direct information for the fact that another felony, other than that for which they had been arrested, and then and was being committed in his presence which under Code Sections 11536, 11541 (Williams' Annotated Code) would clearly warrant this officer in making this investigation.

A case very much in point is that of State v. Cyr, 40 Wash. 2d 840, 246 P. 2d 480, wherein the Supreme Court of

Washington concluded that it was not unreasonable to search the accused's automobile which was parked outside of the place where the arrest was made when it was in close proximity to the place of the arrest and there existed such probable cause to believe that a search of the vehicle would reveal evidence pertinent to the charge. Therefore it was held that such a search was incident to the lawful arrest. In this case a number of other cases from other jurisdictions are reviewed. (1) Where the defendant was arrested in his apartment and a search of his automobile, which was parked in the apartment house garage, was upheld. (2) Where after a person had been arrested for intoxication and his automobile keys were taken from him the officers took the key several blocks and found his car and made a search. The Michigan Court there held that the evidence seized during this search was admissible. It is needless for us to refer to these other cases therein, because if interested the case can be read. We feel though that under the Code Sections last above mentioned that it is essential to the protection of society that a wide discretion be vested in officers chosen to enforce our laws against felonies, and that in view of such a discretion when facts develop as developed herein the officer who did not make the investigation would not be worthy of the name of an officer. The investigation and resulting evidence secured thereby is and should be admissible as evidence in the trial. Such search is not unreasonable and thus not within the constitutional prohibition of search and seizure.

[8] It is very forcefully and ably argued that the trial court committed error in admitting testimony of Mr. Daniels to the effect that four of these suits which were in this car belonged to his company, because it is said that this was erroneously admitted because it comes within that rule prohibiting the proof of other crimes.

In 20 Am. Jur., page 287, Sec. 309, Evidence, the following very sound and general rule is thus stated:

> "A person, when placed upon trial for the commission of an offense against the criminal laws, is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the indictment against him. It is a well-established common-law rule that in criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless the other offenses are connected with the offense for which he is on trial."

This rule has many well recognized exceptions as is said by the annotator of 125 A. L. R. at page 1036:

> "Thus, evidence of other crimes may be admissible for purposes of identifying the defendant, or for establishing a mental state, such as guilty knowledge, motive, or intent on the part of the defendant, or for establishing a common scheme or plan for the commission of several crimes so related to each other that proof of one tends to establish the others."

Among the many exceptions to this rule are several Tennessee cases involving different states of fact. The case of Sykes v. State, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972, is our first case which holds that other acts of sexual intercourse might be shown. There have been many such cases since. In this reported case numerous cases from various jurisdictions are taken up. Since that time we have had many cases in this State where other crimes were shown which come within the quotation from the annotation in A. L. R. above quoted. Some of our cases are Rafferty v. State, 91 Tenn. 655, 16 S. W. 728; Mays v. State, 145 Tenn. 118, 238 S. W. 1096, and Thompson v. State, 171 Tenn. 156, 101 S. W. 2d 467. The Rafferty case is a case

where many fires had been had as is the Thompson case where the man was convicted of arson. We have likewise the authority of Wharton on Criminal Evidence, 12th Edition, Volume 1, at Section 240, under the title, "Plan, Scheme or System," the exceptions are enumerated. It certainly seems to us that under these opinions and under the general exceptions of the land over that there is no error by admitting this evidence when it comes to the peculiar facts of this case. Here within a day or two these parties were caught running away from a store with the storekeeper following them with his suits (there is no denial that they were his suits and were turned over to him in the presence of the plaintiffs in error) and when these things were all feloniously obtained in this way and were all found together with the suit for which they were being tried for stealing or receiving in this particular case it seems to us that it was all an incident of this transaction and was subject to inquiry here for the reasons above expressed.

We have given this case very careful consideration. We feel after this investigation that clearly there is no reversible error in the record and the judgment below must be affirmed with costs.

TYPEWRITTEN OPINION FILED IN SUPREME COURT.

(Filed March 9, 1956.)

288 S. W. (2d) 430.

Dean Liakas and Frank J. Ellsworth
v.
State of Tennessee.

Shelby Criminal.
Hon. Sam D. Campbell, Judge.

For the Plaintiff in Error:

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For the State:

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Opinion.

This is an appeal from a conviction of receiving stolen property with a prison sentence not exceeding ten (10) years in the State penitentiary.

The defendants were tried upon a two-count indictment (1) for the larceny of one suit of clothes of the value of $125.00 and (2) of receiving stolen property, one suit of clothes of the same value, knowing the same to have been stolen.

The verdict of the jury is: "We the Jury Find the Defendant Dean Defort Liakas and Frank James Ellsworth Guilty of Receiving Stolen Property Over Sixty Dollars as Charged and Fix Their Punishment at Ten Years in the Penitentiary."

It thus conclusively appears that they were acquitted of the crime of larceny as charged in the first count in the indictment.

Before considering the assignments of error it is important to take notice of the fact that these defendants were convicted of receiving stolen property (a suit of clothes) at a prior term of the Criminal Court of Shelby County, and their conviction was upheld by this Court. The opinion by Mr. Justice Burnett was released for publication on February 3, 1956, ... S. W. (2d) ... The facts in that case are substantially the same as in the one now before us.

The alleged theft of the suit of clothes occurred in Memphis, Shelby County, on or about the last of August, 1954, or the first of September, which was near the same date as the first offense. Mr. Daniels, the owner and prosecutor, came to Nashville on September 10th for the purpose of identifying the suit of clothes here involved, and found it in defendants' possession, as well as seventeen (17) other new suits which were also found in their possession, some of them having been stolen from Levy Brothers Store in the City of Memphis.

It is not necessary to recite the facts and circumstances which gave rise to their arrest by certain officers of the metropolitan police of the City of Nashville. The facts are stated in detail in the case above referred to.

The questions made on the former appeal, with one exception, are renewed in the instant case. The question is forcibly argued by counsel that "there is no evidence that the defendants committed any crime in Shelby County, Tennessee"; in other words, it is claimed there is no evidence that they are guilty of **receiving** the suit of clothes in said county, knowing the same to have been stolen by another.

We think there is much more than a scintilla of evidence that the crime of receiving was committed in Shelby County. It is not denied that the larceny of this suit, and a number of other suits, was committed in Shelby County.

We concede that larceny is a separate and distinct crime from that of receiving stolen property, and jurisdiction is in the county where it was feloniously received. There is authority to the effect that one cannot be guilty of feloniously receiving from himself. 45 Am. Jur. (Receiving Stolen Property), Section 10, p. 392. However, as evidence of a conflict of authority it is said on page 393:

> "Accordingly, the prevailing American rule appears to be that an accused may be convicted of criminally receiving stolen property, even though he was a guilty participant in the stealing of it, where he took no part in the actual caption and asportation, but participated only as accessory before or after the fact, or in a manner not involving his presence at the taking, even though made a principal in the larceny artificially, by statute."

The question is annotated in 136 A. L. R. 1695. Our own case of Cook v. State, 84 Tenn. 461, 465, apparently supports the above text. The facts were that the theft of two horses took place in Madison County and a few days later Cook was arrested in Clarksville, Montgomery County, with the animals in his possession. The venue was held to be in Madison County upon **slight** circumstantial evidence.

Whether or not the one who is on trial for receiving stolen property is an accomplice with the thief becomes important only when the testimony of one against the other must be corroborated in order to sustain a conviction. Harris v. State, 75 Tenn. 124. In the case at bar neither the thief nor the defendants testified. We pretermit the question of accessory before or after the fact and direct our

tention to the **venue**, i. e., whether or not the crime of re-iving was committed in Shelby County, Tennessee.

The evidence is overwhelming that the defendants were possession of the suit of clothes in question, knowing the me to have been stolen. In order to make a case of **ceiving** it was not incumbent on the State to show that e actual thief was one or the other of the defendants. hile it is true, as a general rule, that "a party guilty of ealing cannot be guilty of receiving the stolen goods" ook's case, supra), it is said in the same case:

> "In cases of this kind, where the party is found in possession of stolen property, and the proof shows his possession to have been a guilty possession, slight circumstances may authorize a jury to determine whether he has been guilty of the theft, or of receiving the property, knowing it to have been stolen."

See Ford v. State, 184 Tenn. 443, wherein it is held that **nue** may be shown by circumstantial evidence.

The record before us points strongly to the fact that the fendants were guilty of receiving stolen property in elby County and thereafter transported the stolen goods Nashville, Davidson County.

One of the strongest circumstances pointing to receiving Shelby County is that the suit in question (and seven-n [17] other suits) were found in an Oldsmobile that s registered in the name of Mrs. Liakas, wife of one of defendants. These garments must have been placed in s car before it left Shelby County. The officer testifying to the registration of the car must have obtained this formation from the records in Shelby County, or State ords, showing it was a Shelby County car. There was objection to this testimony on the ground that the record s the best evidence. There is no proof that Mrs. Liakas

resided elsewhere than in Shelby County. The parking ticket, or claim check, for this car was in the hands of defendant Liakas, who tried to swallow it when he was taken in custody by Officer Elliott. Moreover, these two defendants were in Memphis a few days before they were arrested in Nashville, and we can reach no other conclusion than that they received these suits of clothes from some thief in Shelby County, loaded them in the car of Mrs. Liakas and then drove to Nashville where they were apprehended.

The defendants' possession of these stolen garments is wholly unexplained. Mrs. Liakas was not called on as a witness to testify as to the use of her automobile in this transaction. The defendants introduced no testimony. They are here under a presumption of guilt of receiving and the evidence does not preponderate against the verdict of the jury and in favor of their innocence. Moreover, the trial judge charged the jury properly as to circumstantial evidence, and that "before they could convict the defendants it must be shown beyond a reasonable doubt that the crime (receiving stolen property) was committed in Shelby County, Tennessee, before the finding of the indictment."

There is no merit in the assignment of error that "the defendants were denied a fair and impartial trial." We think the learned trial judge was eminently fair in his trial of the case even though at times his patience may have been exhausted by argument of counsel. There is nothing in the record to support the assignment. Some of the reasons stated in support of this assignment are purely gratuitous and uncalled for.

The judgment of the trial court is affirmed.

Neil, C. J.

FILED
JUN 22 1956
HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. [redacted] 120

DEAN DEFORT LIAKAS,
Petitioner,
vs.
THE STATE OF TENNESSEE,
Respondent.

(Tenn. No. 36,595; 6.)
(Supreme Court #6.)

DEAN DEFORT LIAKAS,
Petitioner,
vs.
THE STATE OF TENNESSEE,
Respondent.

(Tenn. No. 68,967.)
(Supreme Court #9.)

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 983.

DEAN DEFORT LIAKAS, Petitioner, vs. THE STATE OF TENNESSEE, Respondent.		(Tenn. No. 36,595; 6.) (Supreme Court #6.)
DEAN DEFORT LIAKAS, Petitioner, vs. THE STATE OF TENNESSEE, Respondent.		(Tenn. No. 68,967.) (Supreme Court #9.)

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The petition for certiorari complains of the action of the Courts of Tennessee in two cases in which one Liakas and one Ellsworth were found guilty of receiving stolen prop-

erty for which they received prison sentences not exceeding seven years (Tenn. No. 36,595, Supreme Court No. 6) and ten years (Tenn. No. 68,967, Supreme Court No. 9). The petitioner Liakas was tried under an indictment containing two counts charging the offenses of grand larceny (the taking and carrying away of the personal goods of another having a value of more than $60.00) and receiving stolen property. The trials were conducted in the criminal courts in Shelby County, Tennessee, before a jury and trial judge. The petitioner was convicted of the offenses of receiving stolen property in both cases which, in due course, were appealed to the Supreme Court of Tennessee where the convictions were affirmed.

In the first case (Supreme Court No. 6), the Supreme Court of Tennessee held that although the evidence was circumstantial that the offense of receiving stolen property can be proved by circumstantial evidence and that there was material circumstantial evidence supporting the conviction. Under the circumstances, the Court held that the search involved was reasonable although the officer failed to obtain a search warrant. The Court also held that evidence of other crimes was admissible on the theory of showing a plan, scheme, system, guilty knowledge, motive, intent, or the identification of the defendant. (The complete text of the opinion of the Supreme Court of Tennessee [No. 6] is contained in the appendix to the petition for certiorari, pp. 17-29.)

In the second case (Supreme Court No. 9), the Court held that larceny and receiving stolen property are separate offenses and the venue, being jurisdictional, is in the county where stolen property is received. The Court reasserted the rule that in cases involving the offense of receiving stolen property that the venue may be proved by slight circumstantial evidence. The Court declared:

> "The record before us points strongly to the fact that the defendants were guilty of receiving stolen

property in Shelby County and thereafter transported the stolen goods to Nashville, Davidson County."

In disposing of the assignment of error that the petitioner and Ellsworth "... were denied a fair and impartial trial," the able and venerable Chief Justice, speaking for the Supreme Court of Tennessee, candidly concluded:

> "... We think the learned trial judge was eminently fair in his trial of the case even though at times his patience may have been exhausted by argument of counsel. There is nothing in the record to support the assignment. Some of the reasons stated in support of this assignment are purely gratuitous and uncalled for."

(The complete text of the opinion of the Supreme Court of Tennessee (No. 9) is contained in the appendix to the petition for certiorari, pp. 30-34.)

JURISDICTION.

The jurisdiction of this Court is invoked upon the ground that the Supreme Court of Tennessee has decided a Federal question of substance "... not theretofore determined by this Court and has decided it in a way not in accord with applicable decisions of this Court ..." The allegation appears to be based upon some theory involving the due process clause of the Fourteenth Amendment. The allegation is silent as to the specific nature of the Federal question which the Courts of Tennessee have allegedly decided adversely to the petitioner, and is, therefore, too indefinite to show that this Court has jurisdiction. The allegations that substantial Federal questions are involved should be specific and point out the precise nature of such questions as were raised in the State Courts and in the absence of such specific allegations the jurisdiction of this Court is not shown. **Hulbert v. Chicago**, 202 U. S. 275; **Chicago, B. & Q.**

R. Co. v. Chicago, 166 U. S. 226, 231-2. The opinions of the Supreme Court of Tennessee failed to contain a discussion of any Federal question and, consequently, warrant the assumption that a substantial Federal question was not presented to the State Courts. **Mutual Life Insurance Co. v. McGrue**, 188 U. S. 291, 309.

In the second case (Tenn. Supreme Court No. 9) the Court dealt with the assignment of error that the defendants were denied a fair and impartial trial which was disposed of by the Supreme Court of Tennessee in a manner contrary to the insistence. The petitioner alleges that he has been deprived of his liberty without due process of law and that this Court is clothed with jurisdiction under Section 1257 (3), Title 28, United States Code Annotated. The State insists that the jurisdictional averments are inadequate and the subject will receive further treatment in connection with the questions involved because, as we understand them, they were not addressed to the State Courts.

QUESTIONS PRESENTED.

If the principal question presented is correctly understood, the petitioner contends that he has been denied due process of law because he was tried and convicted in the wrong district within the meaning of the Sixth Amendment. This must be the theory of the petitioner because the applicability of the Sixth Amendment is the theme of his argument on page 11 of the petition. The proposition that one accused of crime must be tried in the district and state in which the crime was committed within the purview of the Sixth Amendment applies only to the Federal Courts and not to the state courts. **Gaines v. State of Washington**, 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468; **Raine v. State**, 143 Tenn. 168, 176, 226 S. W. 189. The petitioner's position is untenable as to this proposition because he has failed to assert a substantial Federal question and, therefore, the

Court is without jurisdiction. The Court should not consider this question for the additional reason that it was not raised in the State Courts. Under the Tennessee practice, the construction of the Sixth Amendment in connection with the Fourteenth Amendment should have been raised in this form in the State Courts, but it did not receive consideration because it was not raised in the trial court on motion for a new trial (**State v. Edwards**, 174 Tenn. 542, 545, 129 S. W. 2d 199; **Webb v. State**, 173 Tenn. 518, 519, 121 S. W. 2d 550), nor assigned as error in the Supreme Court of Tennessee (**Mathis v. State**, 164 Tenn. 81, 85, 46 S. W. 2d 44; **Webb v. State**, supra), and hence the petition should be dismissed.

If this is not the meaning of the question involved, the other interpretation is that the venue was in Davidson County rather than in Shelby County, which raises a question of fact for the jury in the trial court. Under the State practice, venue in a criminal case is jurisdictional and may be established by a preponderance of evidence (Gilliland v. State, 187 Tenn. 592, 594, 216 S. W. 2d 323) and may be proved by circumstantial evidence (Ford v. State, 184 Tenn. 443, 458, 201 S. W. 2d 539).

STATUTE INVOLVED.

The petitioner has correctly copied the applicable Tennessee Code Section creating and defining the offense of receiving stolen property. Sec. 10928, Code of 1932. (Although it was not in effect at the time of the trial, the same section may be found in Sec. 4217, Title 39, Tennessee Code Annotated.)

STATEMENT OF THE CASE.

At noon on September 2, 1954, a traffic policeman named Hobbs on duty at Capitol Boulevard and ~~XXXXX~~ Church Street in Nashville observed two men running down Church Street

in a westerly direction. The weather was hot and he remarked about their speed. In a matter of moments he saw one Mallernee, a merchant of Nashville, running after them and calling to passersby, "Stop that thief!" The officer chased and caught one of the men, Ellsworth, near the rear entrance of the Savoy Hotel on Seventh Avenue, and took him back to Mallernee's store (R. 6, pp. 190-194).

The other man ran into Caster-Knott's Department Store and the attention of an officer named Elliott, who was on a shoplifting detail in the store, was directed to a commotion in the front part of the store. He approached and caught Liakas, who was being pursued by Mallernee. Liakas was carrying a case, or valise, containing two suits of clothes which Mallernee claimed to have been stolen from his store. Accompanied by Mallernee, the officer took Liakas to a small room in the Castner-Knott Store and searched him for weapons. During the search Liakas took a parking ticket out of his shirt pocket and undertook to swallow it. His effort to swallow the check, which was for a car in the Cain-Sloan parking garage, was thwarted by the officer, who took the claim check from him. The officer and Mallernee took Liakas back to Mallernee's store where they found Ellsworth in custody of the other police officer (R. 6, pp. 66-75).

Officers Elliott and Hobbs testified that immediately upon the arrival of Mallernee, Elliott, and Liakas at the Mallernee store that Ellsworth offered Mallernee one thousand dollars if he would not prosecute, but the offer was indignantly spurned by Mr. Mallernee, who declared that he would not do it for ten thousand dollars (R. 6, pp. 75, 195).

Officer Elliott proceeded to the Cain-Sloan parking lot which was the name appearing on the claim check. He did not have a search warrant but after a conference with the manager of the parking lot he was accompanied to

where the car was parked. The car was registered in the name of the wife of Liakas although it had Nebraska license plates (R. 6, p. 86). The officer testified that a large number of men's suits lying loose in the seat and hanging in zipper bags could be seen through the windows. The fact that some of the trousers had no cuffs on them was particularly noticeable from where he stood. Shortly afterwards, he took the car and drove it to a parking place near the entrance to the Mallernee store. Upon investigation, a man's suit was found with the clothing in the car and this conviction is based upon that suit which was later identified as belonging to Levy Brothers Store in Memphis, Tennessee (R. 6, pp. 75-106, 148-158).

Mr. Davis, one of the partners in Levy Brothers Store, testified that on September 1, 1954, the day before Liakas and Ellsworth were arrested in Nashville, that they came to Levy Brothers Store in Memphis where Liakas purchased a pair of socks. He took the socks to a dressing room for the announced purpose of putting them on. In the meantime, Ellsworth appeared to be examining men's suits which were hung in racks behind the men's furnishings department. Liakas carried his case, or valise, with him into the dressing room where he stayed about twenty or twenty-five minutes. The suit which is claimed to have been taken from Levy Brothers Store was of a make and pattern sold in the store. In making up an order of clothes for a retailer, the proof shows that the manufacturer of the suit puts a label in it designated by a number the store for which it is made. The label had been cut out of this suit. A tag was attached to the suit upon which there was undecipherable writing. Mr. Davis explained that a notation had been made on a tag by one of the clerks indicating the name of a prospective customer for whom it was being held. The records of Levy Brothers were checked by Mr. Davis, who found that a suit of this precise description was missing from their stock and that

their records failed to disclose, although they customarily would, that the suit had been sold in the usual course of business (R. 6, pp. 109-116). Also, there was testimony introduced to the effect that a suit belonging to one Mr. Daniels in Memphis was found in the car (R. 6, pp. 206-218).

In the other record (Supreme Court No. 9), the prosecutor, one Daniels, identified one of the eighteen suits of clothes which were found in the car as being his personal suit which was taken without his permission from the Julius Lewis store in Memphis (R. 9, pp. 41-52).

The testimony of a room clerk, one Hill, at the Claridge Hotel in Memphis, identified a registration card which was signed in his presence bearing the names "D. Liakas" and "F. J. Ellsworth," being dated August 31, 1954, and having notations in the handwriting of Hill (R. 9, pp. 164-177).

ARGUMENT.

a. In both cases the petitioner was convicted under the second count of an indictment charging that he and his confederate Ellsworth ". . . did unlawfully and fraudulently receive, buy, conceal and aid in concealing . . ." a suit of clothes having a value in excess of $60.00. The cases cited by the petitioner in support of the rule that it is a denial of due process to convict one of an offense with which he was not charged in the indictment have no application to the case at bar because this petitioner was convicted of the offense charged in the indictment.

b. The fact that the suits of clothes were discovered in an automobile which was in either actual or constructive possession of the petitioner was sufficient to support the State's theory of possession. Morelock v. State, 187 Tenn. 478, 480-1 216 S. W. 2d 215. The facts in the case of **Pearson v. U. S.** (6th Cir.), 192 Fed. 2d 681, relied upon by the petitioner are lengthy and complicated. The case does not involve the Tennessee Statute and the indictment in the instant case is broader and specifically alleges ". . . aid in concealing . . ." as being the offense charged. However, we think that the basis upon which the Court upheld the conviction of Pearson has some similarity to the case at bar and on page 689 the Court declared:

> "Scienter is usually a fact to be deduced from the circumstances. As generally stated, the unexplained exclusive possession of stolen property shortly after the commission of larceny or robbery may warrant a finding that the possessor has guilty knowledge. Such a possession must be accounted for in a straightforward, truthful way, and unless the jury finds the explanation reasonable and satisfactory, they may be warranted in returning a verdict of guilty. The possession of recently stolen property, without a reasonable explanation of its possession, consistent with innocence, may be considered by the jury as evidence of

guilty knowledge of its stolen character, as such possession, under these circumstances, permits an inference to be drawn that the possessor knew it was stolen."

Further, this petitioner does not insist that the offense of receiving stolen property is not correctly stated in the indictment. Consequently, there is no insistence that there is a variance between the offense alleged in the indictment and the offense proved by the testimony. Instead, the complaint is that he thinks that his trial should have been held in Davidson County rather than Shelby County. This narrows the proposition as previously indicated to whether there was material evidence presented to the jury that the offense occurred in Shelby County. The jury under the Court's charge must have found that it was not only material evidence but evidence which convinced the members of the jury beyond a reasonable doubt that the offense was committed in Shelby County. The trial judge must have been of the same opinion because he did not disturb the verdict on the motion for a new trial which he overruled. In addition, the Supreme Court of Tennessee found that there was not only material evidence but stated that ". . . the record before us points strongly to the fact that the defendants were guilty of receiving stolen property in Shelby County . . ." (Petition for Certiorari, p. 33). Without additional elaboration, we think that the opinions of the Supreme Court of Tennessee correctly stated and applied the law on the subject of venue to the facts disclosed by the records in the two cases.

c. In addition, in a vague and general way, the petitioner complains that he is being denied his liberty without due process of law. This record fails to disclose that he has been deprived of any element of essential justice in the State Courts. If anything, the trial judge made a particular effort and succeeded in giving the accused every reasonable concession at the hearing. Repeatedly, accord-

to the record, defense counsel was extended every opportunity to present numerous procedural and substantive stions pertinent to the protection of the rights of the used. The questions which he raised were carefully considered and weighed by the trial court. The exceptions served and relied upon in the motion for a new trial and assignments of error predicated upon the latter have n reviewed by the Supreme Court of Tennessee. For many reasons stated in the opinions by the highest rt of Tennesese, the convictions have been sustained because that Court rightfully concluded that the issues of , which in substance are the basis and theory of the ition for certiorari, are supported by material evidence. ese determinations are within the province of the Courts Tennessee and should not be reviewed or disturbed by Court. Hence this Court should exercise its discretion deny the petition.

CONCLUSION.

n conclusion, the respondent respectfully insists that the ition should be dismissed for the reasons stated above the reasons and authorities contained in the opinions he Supreme Court of Tennessee.

Respectfully submitted,

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Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the respondent, hereby certifies that on the ..... day of June, 1956, he served the within and foregoing reply brief upon the petitioner, Dean Defort Liakas, in the following manner as prescribed by Rules 9 and 33 of Federal Court. He deposited at the post office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief securely enclosed in an envelope, air-mail postage duly prepaid, addressed to each of the following at his post office address as stated below, that is to say:

Honorable L. E. Gwinn,
Columbian Mutual Tower,
Memphis, Tennessee.

.....
James M. Glasgow,
Assistant Attorney General.